



Security Council

Distr.
GENERAL

S/1994/1125
4 October 1994

ORIGINAL: ENGLISH

LETTER DATED 1 OCTOBER 1994 FROM THE SECRETARY-GENERAL
ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL

By its resolution 935 (1994) of 1 July 1994, the Security Council requested me to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyse information submitted pursuant to that resolution, together with such further information as the Commission of Experts might obtain through its own investigations or the efforts of other persons or bodies, including the information made available by the Special Rapporteur of the Commission on Human Rights on Rwanda, with a view to providing me with its conclusions on the evidence of grave violations of international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide.

On 26 and 29 July 1994, I informed the Security Council of the establishment of the Commission and its terms of reference and composition (S/1994/879 and S/1994/906). On that occasion, I expressed the hope that, in view of the urgency of the matter, the final report of the Commission would be submitted not later than 30 November 1994.

The Commission began its work on 15 August 1994 and, after a series of meetings in Geneva, conducted a field mission to Rwanda and some neighbouring countries from 29 August to 17 September 1994. Pursuant to a decision taken at its first session, the Commission has transmitted to me an interim report which covers its preliminary investigations and activities prior to 30 September 1994. The Commission has taken the period 6 April 1994 to 15 July 1994 as the temporal mandate for the purpose of its interim report.

The interim report provides an account of the evidence gathered by the Commission during its field visit to Rwanda or provided by various Governments, intergovernmental institutions and non-governmental organizations. It also contains conclusions and recommendations and describes a plan of work for the remainder of its activities.

I wish to draw your attention to the conclusions reached at this stage by the Commission, namely that, in the period under consideration:

(a) Individuals from both sides to the armed conflict have perpetrated serious breaches of international humanitarian law, in particular of obligations set forth in article 3 common to the four Geneva Conventions of 12 August 1949

and in Protocol II additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977;

(b) Individuals from both sides to the armed conflict have perpetrated crimes against humanity in Rwanda;

(c) Acts of genocide against the Tutsi group were perpetrated by Hutu elements in a concerted, planned, systematic and methodical way. These acts of mass extermination against the Tutsi group as such constitute genocide within the meaning of article II of the Convention on the Prevention and Punishment of the Crime of Genocide. The Commission has not uncovered any evidence to indicate that Tutsi elements perpetrated acts committed with the intent to destroy the Hutu ethnic group as such.

The Commission of Experts has recommended that the Security Council take all necessary and effective action to ensure that the individuals responsible for the foregoing grave violations of human rights in Rwanda during the armed conflict are brought to justice before an independent and impartial international criminal tribunal. In order to enhance the fair and consistent interpretation, application and adjudication of international law on individual responsibility for serious human rights violations and to achieve the most efficient allocation of resources, the Commission has further recommended that the Security Council amend the Statute of the International Criminal Tribunal for the former Yugoslavia so that it can consider crimes under international law committed during the armed conflict in Rwanda.

In view of the importance of the contents of the interim report, in particular of its conclusions and recommendations, I am forwarding a copy to you for the information of the Council. I will, of course, bring to the attention of the Security Council the final report envisaged in paragraph 3 of resolution 935 (1994) as soon as the Commission makes it available to me.

(Signed) Boutros BOUTROS-GHALI

Annex

Preliminary report of the Independent Commission of Experts established
in accordance with Security Council resolution 935 (1994)

CONTENTS

	<u>Paragraphs</u>	<u>Page</u>
I. INTRODUCTION	1 - 18	5
A. Mandate	1 - 9	5
B. Composition	10	6
C. Meetings	11 - 13	6
D. Missions carried out in Rwanda and in neighbouring countries	14 - 15	7
E. References made to the Commission of Experts by other United Nations bodies	16 - 18	7
II. SOURCES OF INFORMATION AND ANALYSIS OF INFORMATION RECEIVED BY THE COMMISSION OF EXPERTS	19 - 40	8
A. Information received from States	20 - 24	8
B. Information provided by organs within the United Nations system	25 - 30	8
C. Information provided by other intergovernmental bodies	31	10
D. Information provided by non-governmental organizations	32 - 36	10
E. Information provided by both sides to the armed conflict	37 - 38	11
F. Information provided by private individuals	39 - 40	11
III. OVERVIEW OF THE FACTS	41 - 83	12
A. Background	41 - 43	12
B. Concerted, planned, systematic and methodical nature of the criminal acts	44 - 78	12

CONTENTS (continued)

	<u>Paragraphs</u>	<u>Page</u>
C. Violations of international humanitarian law and of human rights law attributed to the Rwandese Patriotic Front	79 - 83	18
IV. ISSUES OF LAW CONCERNING INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW	84 - 124	19
A. Applicability of international law to the situation in Rwanda	84 - 86	19
B. Breaches of international humanitarian law, particularly those perpetrated against the civilian population	87 - 107	20
C. Crimes against humanity	108 - 118	23
D. Genocide	119 - 124	26
V. ATTRIBUTION (IMPUTABILITY)	125 - 132	27
A. Individual responsibility in international law ...	125 - 128	27
B. Command responsibility	129 - 130	28
C. Defences: superior orders, duress, mistake, military necessity and reprisal	131 - 132	28
VI. THE QUESTION OF CRIMINAL JURISDICTION: ADVANTAGES AND DISADVANTAGES OF INTERNATIONAL PROSECUTION OF INTERNATIONAL CRIMES VERSUS MUNICIPAL PROSECUTION OF INTERNATIONAL CRIMES	133 - 142	28
VII. PROJECTED PLAN OF WORK	143 - 145	30
VIII. CONCLUSIONS AND RECOMMENDATIONS	146 - 154	30
A. Conclusions	146 - 149	30
B. Recommendations	150 - 154	31

/...

I. INTRODUCTION

A. Mandate

1. On 1 July 1994, the Security Council adopted resolution 935 (1994) requesting the Secretary-General to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyse information submitted pursuant to that resolution, with a view to providing the Secretary-General with its conclusions on the evidence of grave violations of international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide.

2. In pursuance of paragraph 3 of the above-mentioned resolution, the Secretary-General submitted, on 26 July 1994, a report to the Security Council (S/1994/879). In that report, the Secretary-General stated that the Council had condemned all breaches of international humanitarian law in Rwanda, particularly those perpetrated against the civilian population during the armed conflict and had recalled that persons who instigated or participated in such acts were individually responsible. The Council had affirmed that the killing of members of an ethnic group with the intention of destroying the group as such, in whole or in part, constituted a crime under international law.

3. Based on the terms of reference set out in Security Council resolution 935 (1994), the Secretary-General requested the Commission of Experts to review and update information available from all sources; to carry out its own investigations in Rwanda; to draw its own conclusions concerning evidence of specific violations of international humanitarian law and in particular acts of genocide; and to determine whether and to what extent certain individuals might be held responsible for having committed those violations.

4. In view of the above, the Commission was requested to examine the question of jurisdiction, whether international or municipal, before which such persons could be brought to trial. The Commission of Experts decided that its temporal mandate should cover the period 6 April 1994 to 15 July 1994. a/

5. Furthermore, the report of the Secretary-General outlined the composition of the Commission of Experts and its operational modalities. In that regard, the Secretary-General took note, inter alia, of the similarities of the mandates entrusted by the Commission on Human Rights in its resolution S-3/1 of 25 May 1994 to the Special Rapporteur on Rwanda and the terms of references outlined by the Council in its resolution 935 (1994) vis-à-vis the Commission of Experts.

6. To avoid unnecessary overlapping and to ensure maximum cooperation between the two investigative bodies, the Secretary-General urged that the information submitted to him in pursuance of the above-mentioned resolutions should be made available to each body in the performance of their respective tasks.

7. For reasons of efficiency, practicality and economy, the Secretary-General decided that the Commission of Experts should be located at the United Nations Office at Geneva, where it could benefit from the resources of the Office of the

/...

United Nations High Commissioner for Human Rights as well as those made available to the Special Rapporteur of the Commission on Human Rights.

8. Given the urgency of the matter, the Security Council requested the Commission of Experts to submit its conclusions within four months of its establishment, through the Secretary-General. The Secretary-General established the deadline of 30 November 1994 for submission of the final report.

9. In addition, the Commission of Experts decided at its first session, on 18 and 19 August 1994, to submit an interim report to the Secretary-General covering its preliminary investigations and activities prior to 30 September 1994.

B. Composition

10. On 26 July 1994, the Secretary-General established the Commission of Experts composed of three members. Accordingly, he nominated Mr. Atsu-Koffi Amega (Togo), as Chairman; Ms. Habi Dieng (Guinea); and Mr. Salifou Fomba (Mali), to serve in their personal capacities.

C. Meetings

11. The Commission of Experts began its work on 15 August 1994, in Geneva. Its first session was held on 18 and 19 August, during which it adopted its internal method of work, rules of procedure and a plan of activities.

12. On 19 August 1994, the Commission of Experts held consultations with the Special Rapporteur of the Commission on Human Rights on Rwanda, Mr. René Dégni-Ségui, to coordinate the modalities of their work, primarily for the purposes of gathering information and evidence concerning their respective mandates. The Commission also met several times with the United Nations High Commissioner for Human Rights. Meetings were held between the Commission and representatives of a number of United Nations organizations, and in particular delegations from the Office of the United Nations High Commissioner for Refugees (UNHCR) and the World Food Programme, and also from the International Committee of the Red Cross (ICRC) and a number of non-governmental organizations.

13. The Chairman appealed to Member States for assistance so as to improve implementation of the Commission's mandate. On 23 August, prior to the Commission's departure for Rwanda, he held a meeting at Geneva with 21 government representatives to outline its immediate plan of activities. His request for assistance, including in matters related to prosecution, police investigations and forensic expertise so that proper hearings of victims and witnesses could be conducted and that mass graves could be exhumed.

D. Missions carried out in Rwanda and in neighbouring countries

14. From 29 August to 17 September 1994, the Commission of Experts conducted a field mission in Rwanda and its three neighbouring countries, Burundi, the United Republic of Tanzania and Zaire. The Commission met with the national authorities of those countries, United Nations officials, representatives of international and local non-governmental organizations, diplomatic representatives and other individuals in order to collect substantial information relating to grave violations of international humanitarian law and acts of genocide committed in Rwanda during the conflict.

15. During its stay in Rwanda, the Commission carried out a number of missions in the field and initiated several investigations. It also had the opportunity to hold a number of meetings with Rwandese refugees at Goma, Zaire, and at Dar-es-Salaam and to collect allegations of violations committed by the Rwandese Patriotic Front (RPF).

E. References made to the Commission of Experts
by other United Nations bodies

16. At its first session, the Commission took note of Security Council resolutions 918 (1994) and 925 (1994), and of the reports of the Secretary-General (S/1994/640 and S/1994/879), leading to the establishment of the Commission.

17. The Commission also took note of the resolution adopted by the Commission on Human Rights at its special session held in Geneva on 25 May 1994 (S-3/1) and of the reports of the Special Rapporteur of the Commission on Human Rights on Rwanda (E/CN.4/1995/7 and E/CN.4/1995/12) submitted pursuant to that resolution.

18. Furthermore, at its forty-sixth session, the Subcommission on Prevention of Discrimination and Protection of Minorities adopted resolution 1994/1 entitled "Situation in Rwanda", which called the attention of the Commission of Experts to the need to inquire, *inter alia*, into events leading to the present situation, including the attack on the plane carrying the Presidents of Burundi and Rwanda, the assassination of the Prime Minister and of Rwandese ministers and dignitaries, as well as of the 10 United Nations soldiers assigned to protect the Prime Minister; to identify the Rwandese and foreign individuals implicated in the traffic of arms or other illicit traffic; and to engage as a priority in the identification and finding of evidence leading to attribution of responsibility of proprietors, management and personnel of certain media institutions especially those of Radio des Mille Collines, which played a crucial role in the perpetration and spread of the atrocities through incitement.

II. SOURCES OF INFORMATION AND ANALYSIS OF INFORMATION
RECEIVED BY THE COMMISSION OF EXPERTS

19. In accordance with Security Council resolution 935 (1994), the Commission of Experts has conducted several investigations and has sought and received reliable information concerning serious human rights violations.

A. Information received from States

20. The Commission has received documents from the Governments of Spain, the United States of America, France and Ireland. They have come primarily from non-governmental organizations and private individuals.

21. Files submitted by the Government of Spain have come from the following institutions: ANB-BIA, the Contacts Committee (Conference of Catholic Bishops of Rwanda and the Protestant Council of Rwanda), the Congregation of Nuns of San José of Gerona, Médecins du Monde (Spain) and from the Society of African Missionaries (Pères Blancs).

22. The United States Government has also submitted documents to the Commission received from the following governmental and non-governmental organizations: the Foreign Affairs Commission of the Senate, the Department of State, Amnesty International (USA) and the United States Committee for Refugees. Information and testimonies contained in these reports indicate that numerous massacres have been perpetrated throughout Rwanda. The victims appear to be overwhelmingly either of Tutsi ethnic origin or Hutus who opposed the regime of former President Juvénal Habyarimana. In addition, these reports reveal that the violations were carried out mostly by armed gangs, including the interahamwe trained by the Presidential Guard and supported by the Rwandese armed forces. The reports mention certain high-ranking officials of the former regime as well as owners and journalists of Radio des Mille Collines as being chiefly responsible for having incited the Hutu population to exterminate Tutsis and to kill moderate Hutus.

23. Most of the organizations that have submitted reports to the Governments of Spain and the United States recommend that the United Nations act urgently with a view to preventing additional human rights violations in Rwanda. They also urge the establishment of an impartial body to investigate serious violations of human rights and humanitarian law, including genocide.

24. The French Government, for its part, has submitted to the Commission information gathered through "Opération Turquoise".

B. Information provided by organs within the
United Nations system

25. The Special Rapporteur appointed in accordance with resolution S-3/1, adopted by the Commission on Human Rights on 25 May 1994, was entrusted with the following mandate:

/...

(a) To investigate at first hand the human rights situation in Rwanda and to receive relevant and credible information on the human rights situation there from Governments, individuals, intergovernmental and non-governmental organizations, including on root causes and responsibility for atrocities committed on a continuing basis;

(b) To gather and compile systematically information on possible violations of human rights and acts that may constitute breaches of international humanitarian law and crimes against humanity, including acts of genocide, in Rwanda and to make that information available to the Secretary-General.

26. The Special Rapporteur has submitted two reports so far. In his first report (E/CN.4/1995/7 of 28 June 1994), the Special Rapporteur indicated that large-scale massacres were organized and carried out by the Hutu militia interahamwe, associated with the Movement révolutionnaire national pour le développement, and by the impuzamugambi, associated with the Coalition pour la défense de la république.

27. The victims of the massacres were mostly either of Tutsi origin or were Hutus considered to be moderate. The report cited numerous heinous acts perpetrated against those groups, including the killing of moderate Hutus by extremist Hutus, acts of torture and other cruel, inhuman or degrading treatment, as well as the incitement of ethnically motivated hatred and violence. The report concluded that responsibility for the above rested with the aforementioned militias and the "transitional Government" of Rwanda. It recommended, inter alia, the establishment of an ad hoc international criminal tribunal or, alternatively, the extension of the jurisdiction of the International Criminal Tribunal for the former Yugoslavia. b/

28. In his second report (E/CN.4/1995/12 of 12 August 1994), the Special Rapporteur denounced in particular the activities of the Radio-Télévision Libre des Mille Collines and of the former Government that fled the country as being primarily responsible for the killing of Tutsis and moderate Hutus and also for the fear or refugees to return to Rwanda.

29. The Special Rapporteur has transmitted to the Commission a list of 55 persons he considers chiefly responsible for the massacres, persons against whom there is "sufficient evidence" regarding massive human rights violations, in particular those concerning genocide.

30. The Commission of Experts has also received information from UNHCR that contains extensive evidence of systematic killings and persecution, in some cases as recently as early September, of Hutu individuals by the RPF army. The victims were consistently reported to have been men, women and children. The vast majority of the killings did not appear to be associated with any suspicion that the victims were personally associated with the April 1994 massacres of Tutsis. Floating bodies, many bound at the hands and feet, indicating death by summary execution, were retrieved from the Kagera River at an average of five bodies per day during the last week of August and the first week of September. The Government of Rwanda has acknowledged that some 60 to 70 Hutus were killed by RPF army soldiers in various parts of the country, although it has described

these killings as "isolated incidents". The Government has reportedly apprehended seven RPF army suspects.

C. Information provided by other intergovernmental bodies

31. The Commission of Experts has received the report on the situation in Rwanda of the Secretary General of the Organization of African Unity (OAU), which was presented to its Council of Ministers at its sixtieth regular session (Tunis, 6-11 June 1994). The Secretary General of OAU concluded in his report that there had been a deterioration of the political situation and a decrease in security arising from the assassination of political leaders and massacre of civilians. These killings were described as deliberately perpetrated and carried out on an almost unimaginable scale. In particular, the report called for the setting up of an independent and impartial expert commission of inquiry to investigate the circumstances of the accident concerning the presidential airplane on 6 April 1994 and the ensuing massacres.

D. Information provided by non-governmental organizations

32. A large number of non-governmental organizations submitted reports to the Commission of Experts. These reports contained either observations of a general nature about violations of human rights and humanitarian law in Rwanda or specific allegations regarding the killing or kidnapping of persons identified by name.

33. The crimes have been attributed principally to the militias identified above, to the Rwandese armed forces, to the political and administrative authorities and to several hundred Rwandese Hutu individuals.

34. A number of reports contain detailed lists of names of presumed authors of the massacres and other abuses. The following non-governmental organizations have provided the Commission with reports: Amnesty International; the Regional Council of Non-Governmental and Development Organizations of Southern Kivu; Droits de l'Homme sans Frontières; International Federation of Human Rights; Médecins du Monde; Médecins sans Frontières; Nord-Sud XXI; World Organization Against Torture; OXFAM; Reporters sans Frontières; the Zaire section of the International Society for Human Rights; the International Service for Human Rights; Survival International and the United States Committee for Refugees. ICRC has also provided information.

35. Most of these reports recommend the establishment of a tribunal to try and punish the individuals responsible for genocide.

36. The information contained in the majority of the reports appears to be precise, detailed and corroborated by information gathered by the Special Rapporteur. Among documents worthy of special attention that could be cited vis-à-vis evidence incriminating specific persons are the Statutes of the Radio-Télévision des Mille Collines (which lists the names and signatures of 50 shareholders) and a formal complaint filed with the Belgian and French judicial authorities by Reporters sans Frontières against certain officials of

/...

the former Rwandese regime who have been identified by name. In the complaint, the individuals named are specifically accused of having committed the following acts: (a) the crime of genocide; (b) grave violations of international humanitarian law; (c) crimes against humanity; and (d) torture and other cruel, inhuman or degrading treatment or punishment. Another piece of evidence on file constitutes a transcript of broadcasts made by Radio des Mille Collines concerning incitement to commit acts of genocide.

E. Information provided by both sides to the armed conflict

37. The Commission has received from both sides to the conflict thousands of pages of documents, letters, complaints and testimonies, both in writing and in other forms (audio and video recordings), indicating that serious violations of international human rights and humanitarian law have taken place. These documents vary in quality. From RPF and, consequently, from the Government that is currently in power in Kigali, the Commission received documents incriminating the former Government, as well as related entities and militias, in crimes against Tutsis. Some of these documents contain lists, which are not exhaustive, of principal suspects. In this context, the Commission received from RPF a list of Hutu persons accused of instigating the massacres and other crimes committed in Rwanda after 6 April 1994.

38. For their part, leaders of the former Government, now in exile, provided the Commission with documents enumerating (a) the names of several hundred persons massacred by the Inkotanyi troops of the RPF; (b) specific sites of some 15 mass graves where victims of massacres perpetrated by the RPF were buried; and (c) written testimony of a number of Hutus who had escaped from areas occupied by RPF during the armed conflict.

F. Information provided by private individuals

39. The Commission also took note of testimonies, reports, complaints and other documents provided by private individuals. They consist primarily of information provided by members of religious orders and foreign nationals who lived in Rwanda or had maintained relations with nationals of Rwanda and Rwandese refugees in Zaire.

40. Information has also been received from associations of Rwandese of each side, resident in other countries, but these show especially strong bias. Pro-Hutu groups argue that the international community should not consider Tutsis as the only victims of the Rwandese tragedy. They point in particular to certain serious violations such as the killing of prisoners, taking of hostages, destruction of property belonging to the Hutu extremists who have fled the country, torture and other cruel, inhuman or degrading treatment. Pro-Tutsi associations have insisted, for their part, on the premeditated and planned nature of the killings by Hutus.

III. OVERVIEW OF THE FACTS

A. Background

41. A number of massacres have been perpetuated in Rwanda in the last 45 years. In particular, the years 1959, 1963, 1966, 1973, 1990, 1991, 1992 and 1993 were marked by massacres in Rwanda. Mass killings were carried out in October 1990, January-February 1991 and March 1992. From December 1992 to February 1993 about 2,000 people were murdered. The report of the fact-finding mission of the International Federation of Human Rights of February 1993 recounted massive and systematic human rights violations. These violations were principally carried out against Tutsi individuals. The facts were corroborated by other sources (see reports published by Amnesty International Rwanda, Persecution of Tutsi, Minority and Repression of Government Critics, 1990-1992, of May 1992; and also of the Association Rwandais pour la Défense des droits de la personne et des libertés publiques, Rapport sur de droits de l'homme au Rwanda, September 1991-September 1992).

42. On 6 April 1994, Juvénal Habyarimana, President of the Rwandese Republic, Cyprion Ntuyamira, President of the Republic of Burundi, and a number of entourage members and crew were killed when the aircraft carrying them was attacked. This disaster triggered a pre-planned execution of severe human rights violations, including systematic, widespread and flagrant breaches of international humanitarian law, large-scale crimes against humanity and genocide.

43. Since 6 April 1994, an estimated 500,000 unarmed civilians have been murdered in Rwanda. That estimate indeed may err on the conservative side for, as the Special Rapporteur of the Commission on Human Rights observed in his report of 28 June 1994 (E/CN.4/1995/7, para. 24), some reliable estimates put the number of dead at close to 1 million. It is unlikely that the world will ever know the exact number of men, women and children slaughtered in this holocaust.

B. Concerted, planned, systematic and methodical nature of the criminal acts

44. Overwhelming evidence indicates that the extermination of Tutsi by Hutu had been planned months in advance of its actual execution. The mass exterminations of Tutsis were carried out primarily by Hutu elements in a concerted, planned, systematic and methodical way and were motivated out of ethnic hatred. These mass exterminations were clearly "committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such" within the meaning of article II of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. Certain organizations such as Doctors without Borders have provided audio tapes and press releases based on information from former informants from the official news service. These informants provided them tapes proving the existence of "Escadrons de la mort", called "Réseau O", established by the staff of the former Head of State who was assassinated.

/...

45. The Rwandese Government of President Juvénal Habyarimana, following colonial policy, had classified Rwandese by ethnic group. The ethnic identity of individuals in Rwanda is traditionally determined on a patrilineal basis, taking sole account of the father's ethnicity. While mixed marriage abound in Rwanda, one is considered a Tutsi in Rwanda where the father is Tutsi, regardless of the mother's ethnic background. In April 1994, the population of Rwanda consisted of approximately 84 per cent Hutu, 14 per cent Tutsi, and 2 per cent other.

46. Certain physical traits have commonly been attributed to the Tutsi population that are taken to distinguish them from Hutu. Tutsi are described as being taller than Hutu, with more aquiline noses, thinner ankles, longer fingers and longer gums.

47. In Rwanda, the ethnic designation of every individual is clearly indicated on his or her identity card. In the past, censuses have been taken that relate the name of each Rwandese to his or her ethnic identity. These lists were used during the killings that began on 7 April 1994.

48. Ample evidence of extensive preparation and planning months in advance of the actual violations indicates the concerted and premeditated character of the criminal acts in question.

49. In 1992, Leon Mugesera, an official in President Habyarimana's Movement révolutionnaire national pour le développement delivered a speech at a party conference at Gisenyi. In his speech, he explicitly called on Hutus to kill Tutsis and to dump their bodies in the rivers of Rwanda. The Commission of Experts has in its possession an audio cassette of this speech, which will likely prove to be of significant probative value to establish the presence of criminal intent to commit genocide when the perpetrators are brought to justice.

50. Racist hate propaganda was disseminated on a widespread basis as far back as 1993, especially by Radio-Télévision Libre des Mille Collines, a private radio station owned by members of President Habyarimana's party. These incitements branded Tutsi as well as certain Hutu opponents of the President as "enemies" and "traitors" who "deserved to die". The radio referred to all Tutsi as "the enemy" and accused them of siding with RPF. It called for all "enemies" to be "exterminated". Posters, leaflets and radio broadcasts on Radio des Mille Collines dehumanized Tutsis as "snakes", "cockroaches" and "animals". Individuals targeted in the radio broadcasts were among the first killed (along with their families) in April 1994.

51. Subsequently, a training camp for Hutu militia (interahamwe) was established at Mutara. The programmes there which lasted for three weeks each, involved indoctrination of groups of 300 men in ethnic hatred against the Tutsi minority. The programmes also propagated information on methods of mass murder. These trainees formed the militia of interahamwe meaning "those who attack together". They formed the core perpetrators of genocide. This militia was augmented by the impuzamugambi, which means "those who have a single aim", of the Hutu Coalition pour le défense de la République. The impuzamugambi militia were trained, armed and led by the Presidential Guard and other elements of the Rwandese government army.

/...

52. Events in the hours immediately following the aircraft crash claiming the lives of President Habyarimana and President Ntamyira underscore that extensive planning and premeditation were involved in the human rights violations. As stated in the report of the Special Rapporteur (ibid., para. 26), the "provisional Government" was formed within only a few hours of the aircraft crash. Within 30 to 45 minutes of the crash, even before the news could be spread by national radio, barricades were erected on certain major thoroughfares. The Special Rapporteur records that within 45 minutes of the crash, the road from the Hotel Méridien to Amahoro Stadium was blocked by soldiers and civilians. He notes that senior officers of the general staff of the "provisional Government" conceded these facts. However, the officers contended that the exceptionally swift pace of events was really attributable to civilians and certain soldiers acting spontaneously in reaction to the sudden death of the Rwandese President, who had enjoyed great popularity. This explanation can hardly be convincing because news of the crash, which had only occurred 45 minutes previously, had yet to be disseminated.

53. Perhaps even more damning, the Rwandese Presidential Guard set up roadblocks that prevented United Nations Assistance Mission for Rwanda (UNAMIR) troops from reaching the airport to investigate the President's assassination. c/

54. Before dawn on 7 April, members of the Presidential Guard went to the homes of moderate opposition members and then killed them and their families. Among those killed were Prime Minister Agathe Uwilingiyimana, 10 Belgian UNAMIR soldiers who tried to protect her, the President of the Supreme Court, (Cour de Cassation) Mr. Joseph Kavaruganda, and human rights advocates Charles Shamukiga, Fidele Kanyabugoyi, Ignace Ruhatana and Patrick Gahizi. Soldiers also attacked a Roman Catholic Centre in Kigali and murdered 17 Tutsi, mostly priests and nuns, including Father Chrysologue Mahame (Society of Jesus) and Abbot Augustin Ntagara.

55. On 8 April 1994, the Presidential Guard, along with Rwandese army troops and interahamwe militia, began a systematic slaughter of Tutsi civilians in Kigali. As the Special Rapporteur states in his report, roadblocks had been set up and identity cards inspected to determine the ethnic identity of individuals within 30 to 45 minutes of the aircraft crash. At this time, individuals bearing Tutsi physical traits were singled out and summarily executed. As reported extensively in press reports, the streets of Kigali had begun to fill with corpses.

56. Eyewitness accounts indicate that house to house searches were carried out and Tutsis were hunted down and killed. Some Tutsis tried to flee to churches or hotels or to places where there might be safety in numbers. However, soldiers systematically murdered Tutsis who had tried to take refuge in the warehouse of the Belgian Red Cross in Kigali. Churches and the Amahoro Stadium were surrounded by soldiers who prevented Tutsis inside from leaving.

57. On 9 April 1994, the Rwandese Army and interahamwe militia continued to slaughter Tutsis at street barricades in Kigali and began to take people out of the churches for execution. At least 100 persons that were either inside or in front of a church were murdered. Others were burnt alive in a chapel.

/...

58. Within the next week, the Presidential Guard and militia had killed an estimated 20,000 people in Kigali and its immediate environs. The mass killings, fomented by Radio des Milles Collines broadcasts which encouraged listeners to "fill the half-empty graves", spread to areas outside Kigali.

59. Many documents from human rights non-governmental organizations have provided non-exhaustive lists of victims:

Human Rights Watch/Africa (Report of June 1994)

- 2,800 persons killed in a church in Kibungo;
- 6,000 Tutsis killed in a church in Cyahinde where they had taken refuge. Only 200 survived;
- 4,000 killed in a church in Kibeho;
- 2,000 killed in a parish in Mibirizi;
- 4,000 killed in Shangi parish;
- 500 killed in Rukara parish;
- Hundreds of sick patients and also medical staff in hospitals in Kigali and in Butare;
- 31 Tutsi orphans and 11 Red Cross volunteers who tried to protect them were killed at the orphanage at Butare;
- 88 students were killed at their school in Gikongoro.

Doctors without Borders (USA)

60. According to testimony on the events of 6 to 30 April 1994, Doctors without Borders provided the names of hundreds of persons murdered, prefecture by prefecture. The perpetrators of the crimes were Rwandan civilians and Hutu refugees from Burundi, RPF army soldiers and also Hutu militia.

Prefecture of Ngenda

- 3 persons were killed in a camp at Burengé (6 to 10 April);
- 5 persons working for Doctors without Borders were assassinated at Burengé, close to the office of the Belgian Red Cross, on 10 April 1994;
- On 7 and 12 April, 24 other persons disappeared from a camp.

Prefecture of Butare

- 600 persons, most of whom were Tutsis, were killed in the commune of Mungaza on 19 April. The perpetrators of the crimes were from Hutu militia and neighbouring communes, made up of and accompanied by the communal administrator, the sector councillor, cell members, the mayor (bourgmestre) and members of the Mouvement révolutionnaire national pour le développement;
- Assassination of numerous sick, wounded and medical staff of the Butare university hospital between 16 and 26 April 1994, by the soldiers of the Rwandese armed forces and Hutu militia;
- Assassination of the Sub-prefect of Butaré (Parti socialiste démocrate, opposition party) and all members of his family, including a child of three months, by elements of the Presidential Guard, interahamwe militia and communal police officers, on 22 April 1994;
- 30 Tutsi civilians were beaten by the Presidential Guard in front of the Fascon Hotel;
- 170 patients (wounded and sick), all belonging to the Tutsi ethnic group, and 5 members of the medical staff, were kidnapped, then beaten to death or cut into pieces, at the Butare university hospital on 22 to 23 April 1994; the perpetrators of the violations were interahamwe militia, supported by Presidential Guard soldiers coming from Kigali and present in the hospital;
- Massacre of 4,000 Tutsi Rwandese civilians in the communal office of Muyaga by Rwandese armed forces soldiers supported by Hutu civilians on 27 April 1994.

Prefecture of Kibungo

- In the centre of Saint Joseph, Kibungo, 2,800 Tutsi persons were attacked on 15 April 1994 by Hutu soldiers and interahamwe militia with grenades.

Prefecture of Gikongoro

- 100 Tutsi civilians were killed in Kibeho (south-west Rwanda) by soldiers of the provisional Government army and by groups of armed Hutus following orders of the army.

United States Committee for Refugees

- 15,000 Tutsis were grouped together, by order of the Kibuye Prefect, at the stadium of Gatwaro, Kibuye, and massacred by interahamwe militia on 18 April 1994;
- Massacre of 4,300 Tutsis at St. Jean Home from 18 to 20 April 1994;

/...

Testimony of clergy gathered by soldiers of Opération Turquoise

- 30 priests of the Nyundo Diocese were assassinated;
- Massacres and mass graves (pits) at Birambo, on the order of the mayor (bourgmestre) of Bwakira, and of the Sub-prefect of Birambo.

Other testimony from general sources

61. On 11 April, more than 800 Tutsi gathered at Kiziguro Roman Catholic Church, Murambi district, Byumba prefecture. Rwandese soldiers and militia attacked and killed all but 10 of them. Those survivors threw themselves into the mass grave to avoid being hacked to death.

62. Nine Tutsi patients at the Kigali hospital were killed in separate attacks on 11 and 15 April by Rwandese government soldiers.

63. It was reported that 500 Tutsi were killed by interahamwe militia and gendarmes at Rukara Roman Catholic mission in Kibungo prefecture, Rukara district.

64. On 15 April and thereafter, Rwandese army troops distributed automatic and semi-automatic rifles and pistols to interahamwe militia, with which they continued the mass slaughter of Tutsis that had begun with machetes and other weapons.

65. On 17 April more than 100 Tutsi were killed by soldiers and militia at Nyanza. On 18 April, 2,000 Tutsi were massacred by interahamwe militia in the Mibirizi Roman Catholic church, Cyangugu prefecture, Cyimbogo district.

66. On 19 April, the President of the provisional Rwandese government, Theodore Sindikubwabo, spoke on the radio and called for the killing of "accomplices" in Butare. The Presidential Guard flew in that night and dug pits, filled them with burning tires, and pushed Tutsi into them. They also executed Tutsi near the National University for the next three days, killing thousands.

67. Over 2,800 people, most of them Tutsi, were killed at Mukarange Roman Catholic parish, Kibungo prefecture, Rwamagana district. Interahamwe militia used grenades, machine-guns, R4 rockets and machetes in this massacre.

68. In Gikongoro, 88 students were singled out because of their Tutsi origin and slaughtered at their school.

69. On 23 April, Government troops and militia murdered 170 Tutsi patients and staff at Butare hospital. Doctors of Médecins sans frontières witnessed these acts.

70. On 29 April, military and militia killed over 300 of 5,000 hostages held in the Cyangugu stadium.

/...

71. On 30 April, the Rwandese Government radio called on people to take up arms against "the enemy" (the Tutsi) all over Rwanda. Leaders of the Hutu militia called upon their members to finish the "nettaoyage" (cleansing) of Rwanda of all Tutsi.

72. On 1 May, at the Butare orphanage, militia murdered 21 orphan children, segregated on account of their Tutsi origin, along with 13 Rwandese Red Cross volunteers who tried to protect them.

73. Beginning on 11 May, militia and military took hundreds of Tutsis from the Cyangugu stadium into the countryside by bus, where they were murdered.

74. In Cyahinda, over 5,800 Tutsi who had taken refuge in a church were murdered. Only 200 people survived the massacre.

75. On 16 May, Rwandese government troops and militia removed hundreds of Tutsis from the church centre of Kabgayi and executed them, while only a few kilometres away the Rwandese "Minister of Defense" of the "provisional Government", Augustin Bizimana, told reporters the massacres had stopped.

76. In Kigali, thousands of Tutsis sought refuge in the Amahoro Stadium, the Hotel des Mille Collines, the Sainte Famille Church and other locations. Militia entered at night on a number of occasions, removed hundreds of Tutsis from the Stadium and church, then murdered them.

77. The genocidal massacres in Rwanda continued into July 1994. The Commission could cite many more massacres committed by Rwandese government soldiers and Hutu militia against the Tutsi of Rwanda.

78. The mass murder of Tutsis continued throughout areas controlled by the Rwandese "provisional Government". Reliable estimates put the number of persons murdered in Rwanda between the period 6 April 1994 and 15 July 1994 at half a million.

C. Violations of international humanitarian law
and of human rights law attributed to the
Rwandese Patriotic Front

79. While the massacres perpetrated by RPF were less systematic than those of the Rwandese armed forces and Hutu militia, certain crimes against humanity are alleged to have been carried out by RPF.

80. The former exiled Government submitted to the Commission many lists of persons alleged to have been massacred by RPF. In particular, it is alleged that 11 Hutu were murdered in August, including certain persons returning from exile, and that 27 Hutu families were massacred between 2 and 12 April 1994. The former Government also provided a document that alleged the existence of mass graves attributed to RPF elements, including 8 in Kigali.

81. Other lists were submitted by witnesses and parents of Hutu victims, now refugees in Zaire: about 300 persons were alleged to have been killed by the

/...

Inkotanyi (regulars of the RPF forces) in Byumba prefecture. In the commune of Bwisige, it is alleged that the following massacres were perpetrated: 30 Hutus killed in Bwisiga sector; 49 in Nyarurama sector; 52 in Kabongoya sector; 52 in Buhanga sector; 22 in Gihuke sector; 26 in Muti sector and 25 in Karehe sector. The former Government has alleged that, in Kigali prefecture, RPF elements massacred 102 Hutus in the communes of Rutongo, Shorgi, Mutwa and Rwerere from April to June 1994.

82. The Commission of Experts has concluded that there exist substantial grounds to conclude that mass assassinations, summary executions, breaches of international humanitarian law and crimes against humanity were also perpetrated by Tutsi elements against Hutu individuals and that allegations concerning these acts should be investigated further. To this point, the Commission has not uncovered any evidence to indicate that Tutsi elements perpetrated acts committed with intent to destroy the Hutu ethnic group as such within the meaning of the Genocide Convention of 1948.

83. As it was finalizing the present document, the Commission of Experts received reports of violations of the right to life in Rwanda perpetrated in the period from August to early September 1994. The Secretary-General has asked the Commission to investigate these reports. The Commission will undertake to investigate the reports within the terms of its mandate and to submit its report to the Secretary-General in accordance with his request.

IV. ISSUES OF LAW CONCERNING INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW

A. Applicability of international law to the situation in Rwanda

84. The applicability of international legal norms to the situation in Rwanda in the period 6 April to 15 July 1994 depends upon (a) the legal status of the conflict (determined by the factual situation in Rwanda and the legal norms in force); (b) the scope ratione materiae of specific norms of international human rights law and international humanitarian law (determined by their content); and (c) the legal status of these norms (determined by their sources of law).

85. With these indices in mind, it is clear that international legal norms providing for individual responsibility for serious human rights violations have been breached in Rwanda during the period 6 April to 15 July. d/ Specifically, certain individuals are responsible for breaches of (a) norms of international humanitarian law on a systematic, widespread and flagrant basis; (b) norms prohibiting crimes against humanity; and (c) norms prohibiting acts of genocide.

86. The relevant norms of international law providing for individual responsibility overlap to a certain extent. Consequently, in some instances a single act may qualify as a crime on more than one separate and distinct legal ground.

B. Breaches of international humanitarian law, particularly those perpetrated against the civilian population

87. Rwanda succeeded to the Geneva Conventions of 12 August 1949 on 5 May 1964 and acceded to Protocols additional thereto of 1977 on 19 November 1984. e/

88. The applicability of international humanitarian law hinges on the status of the conflict.

89. First, there must be an armed conflict. There can be no doubt that the conflict in Rwanda was an armed conflict as evidenced by the means and methods employed by those involved, and as evidenced by the sheer scale of atrocities committed during the period 6 April to 15 July 1994.

90. Secondly, precisely which rules of international humanitarian law apply to the armed conflict in Rwanda between 6 April and 15 July depends on whether the armed conflict is to be considered an international armed conflict or a non-international conflict. f/

91. The armed conflict between the period 6 April and 15 July 1994 qualifies as a non-international armed conflict. The use of armed force had been carried out within the territorial borders of Rwanda and did not involve the active participation of any other State. Third State involvement entailed peacemaking and humanitarian functions rather than belligerent action.

92. This is not to say that the armed conflict in Rwanda has not had a serious effect on neighbouring States or on the international community as a whole. Serious repercussions on the social and political welfare and internal stability of neighbouring States has been affected. For example, the massive influx of refugees into their respective territories has created difficulties. Moreover, the conflict in Rwanda makes it an obvious threat to international peace and security within the meaning of Chapter VII of the Charter of the United Nations. None the less, these aspects do not alter the basic character of the armed conflict in Rwanda during the period 6 April to 15 July 1994 as predominately non-international in character.

93. Accordingly, the obligations set out in common article 3 to the four Geneva Conventions of 1949 governing "situations not of an international character", as well as Protocol II g/ additional thereto (intended to develop and supplement common article 3 but without modifying its existing conditions of application) h/ are applicable.

94. At the other end of the scale, the non-international armed conflict in Rwanda cannot be considered to be of a purely internal nature within the meaning of article 1 (2) of Protocol II. The violence in Rwanda has far exceeded mere "internal disturbances and tensions, such as riots, isolated acts of violence [or] other acts of a similar nature". i/ The evidence indicates very clearly that the violence perpetrated in Rwanda was carried out not by small groups in a spontaneous fashion, but by individuals under a responsible command that conducted "sustained and concerted military operations" j/ involving strategic planning and tactical sophistication. k/

/...

95. Common article 3 to the Geneva Conventions of 12 August 1949 prohibits "at any time and in any place whatsoever":

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular humiliating and degrading treatment; and

(d) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

against "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause".

96. Article 3 (2) provides that "the wounded and sick shall be collected and cared for".

97. Article 4 of Protocol II, which supplements article 3 common to the four Geneva Conventions, prohibits the following acts against "all persons who do not take a direct part or who have ceased to take part in hostilities":

(a) Violence to the life and person, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation, cruel treatment or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Slavery and the slave trade in all their forms;

(g) Pillage;

(h) Threats to commit any of the foregoing acts.

98. Article 4 of Protocol II provides that children shall be provided with the care and aid they require and that "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities".

/...

99. Article 5 of Protocol II provides that "the following provisions be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained":

(a) The wounded and sick shall be treated in accordance with article 7;

(b) The persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict;

(c) They shall be allowed to receive individual or collective relief;

(d) They shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions;

(e) They shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population.

100. Article 7 (1) requires that:

"All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected."

101. Article 7 (2) provides that:

"In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones."

102. Article 8 requires that:

"Whenever circumstances permit, and particularly after an engagement, all possible measure shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead, prevent their being despoiled, and decently dispose of them."

103. Article 9 provides that medical and religious personnel shall be respected and protected. Article 11 provides that medical units and transports shall be respected and protected at all times and shall not be the object of attack.

104. Part IV of Protocol II relates to protection of the civilian population. Article 13 provides that:

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

105. Article 14 guarantees protection of objects indispensable to the survival of the civilian population. Article 16 provides for protection of cultural objects and places of worship.

106. Article 17 provides that:

"The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition."

107. The Commission of Experts has determined that common article 3 of the Geneva Conventions of 1949 and the provisions cited above of Protocol II additional to the Geneva Conventions of 1949 were violated in Rwanda during the period 6 April to 15 July 1994 on a systematic, widespread and flagrant basis.

C. Crimes against humanity

108. To understand whether and to what extent norms prohibiting crimes against humanity apply to the armed conflict in Rwanda it is necessary to consider the content and legal status of "crimes against humanity" as a norm of international law.

109. "Crimes against humanity" as a legal category is not as clear in content or legal status as "genocide" or breaches of the Geneva Conventions or Protocol's additional thereto. A certain level of ambiguity in the content and legal status of "crimes against humanity" derives partly from its formulation in the Nuremberg Charter and partly from the way it was interpreted by the Nuremberg Tribunal.

110. "Crimes against humanity" were cast in article 6 (c) of the Nuremberg Charter as:

"murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the [Second World] war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the [Nuremberg] Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

It was unclear at the outset as to whether norms prohibiting "crimes against humanity" were intended to overlap with norms prohibiting war crimes or whether they were supposed to be independent juridical concepts.

111. Article 6 (c) of the Nuremberg Charter does narrow the concept of "crimes against humanity" considerably. As Sunga 1/ states:

"In particular, the acts must have been committed against civilians rather than soldiers (whereas norms prohibiting war crimes restrict actions against soldiers as well), and the acts must have been committed 'either before or during the war' (although what period of time before the war is not specified). A Protocol of 6 October 1945, done in Berlin, amended the original version of article 6 (c). The original provision contained a semicolon which followed the word 'war' which seemed to imply that murder etc. could be considered as crimes against humanity independent of the jurisdiction of the Tribunal. However, the semicolon was replaced with a comma by the Protocol. The result was to imply that crimes against humanity were to be interpreted to import liability only for acts connected to the war."

Moreover, the United Nations War Crimes Committee on Facts and Evidence in 1946 sought to clear up any ambiguity by stating that:

"... crimes against humanity as referred to in the Four Power Agreement of 8th August 1945, were war crimes within the jurisdiction of the [United Nations War Crimes] Commission." m/

112. Consequently, "crimes against humanity" were interpreted by the Nuremberg Tribunal as offences that were connected to the Second World War, rather than to any situations that might have existed prior to it.

113. If the normative content of "crimes against humanity" had remained frozen in its Nuremberg form, then it could not possibly apply to the situation in Rwanda that existed between 6 April and 15 July 1994 because there was not a "war" in the classic sense of an inter-State or international armed conflict.

114. However, the normative content of "crimes against humanity" - originally employed by the Nuremberg Tribunal for its own specific purposes in connection with the Second World War - has undergone substantial evolution since the end of the Second World War.

115. First, even the Nuremberg Tribunal itself had established that "crimes against humanity" covered certain acts perpetrated against civilians, including those with the same nationality as the perpetrator. Indeed, "crimes against humanity" as a normative concept finds its very origins in "principles of humanity" first invoked in the early 1800s by a State to denounce another State's human rights violations of its own citizens. Thus, "crimes against humanity" as a juridical category was conceived early on to apply to individuals regardless as to whether or not the criminal act was perpetrated during a state of armed conflict or not and regardless of the nationality of the perpetrator or victim.

/...

116. Secondly, the content and legal status of the norm since Nuremberg has been broadened and expanded through certain international human rights instruments adopted by the United Nations since 1945. In particular, the Genocide Convention of 1948 affirms the legal validity of some of the normative content of "crimes against humanity" as conceived in article 6 (c) of the Nuremberg Charter, but does not overtake it. The International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the United Nations General Assembly on 30 November 1973 refers in article 1 to apartheid as a "crime against humanity".

117. Thirdly, the Commission of Experts on the former Yugoslavia, established by the Security Council in its resolution 780 (1992) has stated that it considered crimes against humanity to be:

"gross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the conflict, as part of an official policy based on discrimination against an identifiable group of persons, irrespective of war and the nationality of the victim." n/

This view finds support in the writings of publicists. o/

118. The Commission of Experts on Rwanda considers that "crimes against humanity" are gross violations of fundamental rules of humanitarian and human rights law committed by persons demonstrably linked to a party to the conflict, as part of an official policy based on discrimination against an identifiable group of persons, irrespective of war and the nationality of the victim, and includes acts such as the following:

- Murder and extermination;
- Enslavement;
- Deportation and population transfer;
- Persecution;
- Mutilation;
- Cruel treatment;
- Humiliating and degrading treatment;
- Torture;
- Unlawful human experimentation;
- Apartheid.

The Commission has determined that there exists ample grounds to conclude that "crimes against humanity" were committed in Rwanda between the period 6 April and 15 July 1994.

/...

D. Genocide

119. The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the United Nations General Assembly on 9 December 1948 and entered into force on 12 January 1951 in accordance with article XIII. Rwanda acceded to the Genocide Convention on 16 April 1975. Rwanda entered a reservation that states: "The Rwandese Republic does not consider itself as bound by article IX of the Convention." Article IX provides that:

"Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

Even if Rwanda had not ratified the Genocide Convention, it would be bound by the prohibition of genocide which forms part of customary international law. Moreover, it is universally accepted and recognized by the international community that the prohibition of genocide has attained the status of jus cogens. It therefore has a peremptory status. p/ For these reasons, the prohibition of genocide as affirmed in the Genocide Convention applies to all members of the international community rather than merely to parties to the Convention.

120. Article I of the Genocide Convention affirms that "genocide, whether committed in time of peace or in time of war, is a crime under international law" which ratifying States undertake to prevent and punish.

121. Article II provides that:

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical (sic), racial, or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group."

122. Article III provides that "the following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;

- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide."

123. Article IV provides that "persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

124. The Commission of experts has determined that there are ample grounds to conclude that every provision laid out in article III of the Genocide Convention has been violated in Rwanda in the period 6 April to 15 July 1994 in respect of a specific ethnic group as such.

V. ATTRIBUTION (IMPUTABILITY)

A. Individual responsibility in international law

125. The attribution of responsibility to the individual in propria personam is not entirely new. Indeed, military trials of individuals for having committed war crimes date back at least to 1419, as Keen documents in his work The Laws of War in the Middle Ages. g/ There is also the international trial of Peter von Hagenbach, which took place in 1474 for acts that today are considered crimes against humanity. International legal norms stipulating individual responsibility for slave-trading and slave-trafficking and for piracy arose out of the Congress of Vienna in 1815. Today these norms are considered part of customary international law and probably of jus cogens. r/

126. It is true that international responsibility is predominantly, even almost exclusively, centred around States rather than other entities. This should not be surprising since it is the State that is the primary subject of international law. Prior to the Nuremberg Trials following the end of the Second World War, even war crimes and crimes against humanity involved responsibility primarily of the State rather than of the individual.

127. However, the Nuremberg Trials established clearly the principle that any individual, regardless of office or rank, shall be held responsible in international law for war crimes, crimes against peace or crimes against humanity. It symbolized the possibility that trials could actually be carried out and punishment enforced in modern times.

128. The principle that the individual shall be held responsible for serious violations of human rights - firmly enforced by the Nuremberg Tribunal and today universally recognized by the international community - is the same principle that guides the operation of the International Criminal Tribunal for the former Yugoslavia and of the present Commission of Experts on Rwanda acting in conformity with United Nations Security Council resolution 935 (1994).

B. Command responsibility

129. It is a well-established principle of international law that a person who orders a subordinate to commit a violation for which there is individual responsibility is as responsible as the individual that actually carries it out. The Nuremberg Principles, adopted by the United Nations General Assembly on 11 December 1946, affirmed that even a Head of State is not free from responsibility under international law for the commission of a crime under international law. s/

130. The principle of command responsibility has been incorporated in article IV of the Genocide Convention laid out above and is expressed also in article 86 (2) of the 1977 Protocol I additional to the Geneva Conventions of 1949 relating to international armed conflicts. It finds expression again in the Draft Code on Crimes against the Peace and Security of Mankind. t/

C. Defences: superior orders, duress, mistake, military necessity and reprisal

131. Since the inception of the Nuremberg Charter it has been recognized that the existence of superior orders does not provide an individual with an exculpatory defence. u/ Nevertheless, the existence of superior orders may be taken into account with respect to mitigation of punishment.

132. The Commission wishes to note that it considers the defences of duress and mistake of fact as possible defences to individual allegations of serious human rights violations.

VI. THE QUESTION OF CRIMINAL JURISDICTION: ADVANTAGES AND DISADVANTAGES OF INTERNATIONAL PROSECUTION OF INTERNATIONAL CRIMES VERSUS MUNICIPAL PROSECUTION OF INTERNATIONAL CRIMES

133. The Commission of Experts wishes to register its strong support for the creation of an international criminal tribunal (or perhaps expansion in the jurisdiction of an existing one) to undertake prosecutions of individuals on the basis of international law. It considers that prosecution of individuals for having committed crimes under international law during the armed conflict in Rwanda would be better undertaken by an international, rather than by a municipal, tribunal for the reasons explained below.

134. One could argue that a municipal tribunal could be more sensitive to individual cases and more responsive to the needs of the local community because it is likely to be situated in, or close to, the site where alleged violations were perpetrated. Secondly, the gathering of evidence and visitation of the site of the alleged atrocities could be facilitated by having a municipal court preside over these cases. Thirdly, in some instances, judgements of municipal courts could be of greater and more immediate symbolic force because verdicts would be rendered by courts familiar to the local community. Conversely,

/...

international prosecution could be perceived in some cases to be too far removed from the actual community it serves.

135. However, one should not confuse the jurisdiction of the tribunal competent with trying individual suspects with the site where the trial is held. No inconsistency would in any way exist between having cases brought under the jurisdiction of an international criminal tribunal and between having the trials conducted by that tribunal in the territory of Rwanda if that were deemed suitable.

136. There are some obvious disadvantages to the municipal prosecution and trial of individuals in cases where the crimes alleged concern extremely severe violations, such as those determined to have taken place in Rwanda between 6 April and 15 July 1994. Municipal prosecution in these highly emotionally and politically charged cases can sometimes turn into simple retribution without respect for fair trial guarantees. Even where such trials are conducted with scrupulous regard for the rights of the accused, there is a great likelihood that a conviction will not be perceived to have been fairly reached.

137. Therefore, for the purposes of independence, objectivity and impartiality, there are advantages in having trials conducted by an international criminal tribunal in a place such as The Hague for the very reason that there would be a certain measure of distance from the venue of the trial and the places where severe atrocities have been perpetrated.

138. Moreover, the gravity of human rights violations committed in Rwanda from 6 April to 15 July 1994 extends far beyond Rwanda. As a matter of international peace and security, they concern the international community as a whole. It is not only a matter of ensuring justice in respect of atrocities that have already been perpetrated, but also a matter of deterrence for the future. The coherent development of international criminal law better to deter such crimes from being perpetrated in future not only in Rwanda but anywhere, would best be fostered by international prosecution rather than by domestic courts. An international tribunal can more effectively take account of the relevant international legal norms in their specificity because that forms its special field of competence. Domestic courts are not likely to be as familiar with the technique and substance of international law.

139. It would seem that if criminal cases concerning Rwanda could perhaps be brought under the competence of the International Criminal Tribunal for the former Yugoslavia (created pursuant to Security Council resolutions 808 (1993) and 827 (1993)), this could greatly advance the cause of international criminal justice.

140. The alternative of creating an ad hoc tribunal along side the already existing international criminal tribunal in The Hague would not only be less efficient from an administrative point of view of staffing and use of physical resources, but would be more likely to lead to less consistency in the legal interpretation and application of international criminal law.

141. For these reasons, the Commission of Experts recommends that trials of individuals suspected of serious breaches of international humanitarian law,

crimes against humanity and acts of genocide be carried out by an international criminal tribunal.

142. The Commission of Experts considers it preferable that the jurisdiction of the International Criminal Tribunal for the former Yugoslavia be expanded to cover international crimes committed in Rwanda from 6 April rather than to create a separate ad hoc international criminal tribunal.

VII. PROJECTED PLAN OF WORK

143. The Commission intends to investigate particular cases with a view to forwarding that information to an international prosecutor or - in the event that such prosecutor is not appointed - to national prosecutors when they are deemed to be in a position to receive the information in question.

144. The method to be used in securing evidence will be in accordance with generally accepted rules governing criminal investigations. Guidance will be sought in the Statute for the International Criminal Tribunal for the former Yugoslavia and its rules of procedure.

145. The final report will only refer to these investigations in general terms so as not to destroy evidence or otherwise impede future prosecutions or cause security risks to victims and prosecution witnesses.

VIII. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

146. The Commission of Experts concludes, on the basis of ample evidence, that individuals from both sides to the armed conflict in Rwanda during the period 6 April 1994 to 15 July 1994 have perpetrated serious breaches of international humanitarian law, in particular of obligations set forth in article 3 common to the four Geneva Conventions of 12 August 1949 and in Protocol II additional to the Geneva Conventions and relating to the protection of victims of non-international armed conflicts, of 8 June 1977.

147. The Commission of Experts concludes also that ample evidence indicates that individuals from both sides to the armed conflict perpetrated crimes against humanity in Rwanda in the period mentioned above.

148. After careful deliberation, the Commission of Experts has concluded that there exists overwhelming evidence to prove that acts of genocide against the Tutsi group were perpetrated by Hutu elements in a concerted, planned, systematic and methodical way. Abundant evidence shows that these mass exterminations perpetrated by Hutu elements against the Tutsi group as such, during the period mentioned above, constitute genocide within the meaning of article II of the convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948. To this point, the Commission has not uncovered any evidence to indicate that Tutsi elements perpetrated acts

committed with intent to destroy the Hutu ethnic group as such during the said period, within the meaning of the Genocide Convention of 1948.

149. The Commission considers that to enhance the fair and consistent interpretation, application and adjudication of international law on individual responsibility for serious human rights violations and to effect the most efficient allocation of resources, the jurisdiction of the International Criminal Tribunal for the former Yugoslavia should be expanded to permit cases concerning the situation in Rwanda to be brought under it.

B. Recommendations

150. The Commission of Experts strongly recommends that the Security Council take all necessary and effective action to ensure that the individuals responsible for the serious violations of human rights in Rwanda during the armed conflict triggered on 6 April 1994 are brought to justice before an independent and impartial international criminal tribunal.

151. The Commission of Experts recommends that the Security Council take all measures to ensure that individuals shall be accorded a fair trial on the facts and law according to international standards of law and justice.

152. The Commission of Experts recommends that the Security Council amend the Statute of the International Criminal Tribunal for the former Yugoslavia to ensure that its jurisdiction covers crimes under international law committed during the armed conflict in Rwanda that began on 6 April 1994.

153. The Commission of Experts wishes to express its gratitude to Mr. José Ayala Lasso, the United Nations High Commissioner for Human Rights, and to Mr. Ibrahima Fall, Assistant Secretary-General for Human Rights, for their coordinated efforts and support to the Commission.

154. The Commission of Experts will submit its final report to the Secretary-General by 30 November 1994.

Notes

a/ The Commission of Experts wishes to make clear that the choice of its own mandate covering the period 6 April to 15 July 1994 is not meant to imply that jurisdiction ratione temporis of a tribunal, if formed to try and punish individuals responsible for crimes under international law in Rwanda, should be in any way limited to this period. The Commission considers that 6 April 1994 was clearly the date that the pertinent armed conflict was triggered. However, the Commission chooses to consider 15 July 1994 as a convenient end-point delimiting its temporal mandate over the situation in Rwanda, for the purpose of making its preliminary report. The Commission of Experts reserves the right to extend, contract or in any other way modify its temporal mandate in conformity with Security Council resolution 935 (1994).

b/ The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, established by Security Council resolution 827 of 25 May 1993 will be referred to in this report as the "International Criminal Tribunal for the former Yugoslavia".

c/ See Human Rights Watch: Africa, May 1994, p. 3.

d/ A more developed argument will appear in the final report to be submitted to the Security Council by 30 November 1994.

e/ Even if Rwanda had not become a party to the Geneva Conventions of 1949, it is universally widely acknowledged that common article 3 has become part of customary international law binding non-parties to the Conventions and is very likely to have attained the status of ius cogens as well. Norms of a ius cogens have a peremptory status and do not permit of any derogation or exception.

f/ Article 2 common to the four Geneva Conventions of 12 August 1949 concerns the applicability of the Conventions to all cases of declared war between two or more High Contracting Parties, even if the state of war is not recognized by one of them and all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Article 3 common to the four Geneva Conventions of 12 August 1949 applies to cases of "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties".

g/ Protocol II: Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts, entered into force on 7 December 1978.

h/ See article 1 of Protocol II.

i/ See article 1 (2) of Protocol II to the Geneva Conventions of 1949.

j/ See article 1 (1) of Protocol II.

k/ Therefore, article 1 (2) of Protocol II relating to the protection of victims of non-international armed conflicts, which provides that "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts", does not apply in the case of Rwanda.

l/ Sunga, Individual Responsibility in International Law for Serious Human Rights Violations, 1992. See also, Reshetov, "Development of Norms of International Law on Crimes against Humanity" in The Nuremberg Trial and International Law, Ginsburgs and Kudriavtsev (eds.) 1990, pp. 199-200.

m/ See Dinstein, International Criminal Law 20 Israel L. Rev. 206-242 (1985) and Id. at 36-7.

n/ S/25274, annex I, para. 49.

o/ See, for example, Reshetov, "Development of Norms of International Law on Crimes against Humanity" in The Nuremberg Trial and International Law, Ginsburgs and Kudriavtsev (eds.) 1990, p. 199. See also, Bassiouni, Crimes against Humanity in International Criminal Law, 1992, chap. 11.

p/ Article 53 of the Vienna Convention on the Law of Treaties, 1969 provides that a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

q/ Keen, The Laws of War in the Middle Ages, 1965.

r/ See Sunga, Individual Responsibility in International Law for Serious Human Rights Violations, 1992, and, generally, Bassiouni, International Criminal Law, 1986.

s/ See General Assembly resolution 95 (I) of 11 December 1946.

t/ See report of the International Law Commission on the work of its forty-third session (A/46/10).

u/ Article 8 of the Nuremberg Charter provides that "The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determine that justice so requires".
